



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 22 and 124

[FRL-9956-53-OARM]

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/ Termination or Suspension of Permits; Procedures for Decisionmaking

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule revises the Environmental Protection Agency's ("EPA")

Consolidated Rules of Practice governing the administrative assessment of civil penalties and various other administrative adjudicatory hearings. These revisions simplify the administrative processing of cases by removing inconsistencies, codifying electronic filing and service procedures, and streamlining the procedures in cases initiated at EPA Headquarters. This rule also corrects some punctuation typographical errors found in the Consolidated Rules of Practice. This rule similarly revises EPA's procedures governing decisionmaking in permit appeals. These amendments are procedural in nature and none of these changes are intended to substantively alter the Agency's administrative enforcement actions or review of permit appeals.

DATES: This rule is effective on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Michael B. Wright, Office of Administrative Law Judges, U.S. Environmental Protection Agency, Ronald Reagan Building, Room M1200,

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SUPPLEMENTARY INFORMATION:

I. Why is the EPA Issuing This Rule in Final Form Without First Issuing a Proposal?

Today's final rule is limited to procedural requirements for administrative adjudicatory hearings and appeals from such hearings and from permit decisions. Under the Administrative Procedure Act, an agency may issue "rules of agency organization, procedure, or practice" without first proposing such rules for public comment. 5 U.S.C. 553(b). Accordingly, public comment is not required.

II. Does this action apply to me?

This action affects parties involved in EPA administrative adjudicatory proceedings for the assessment of civil penalties, issuance of various compliance orders, and termination or suspension of certain permits, under part 22 of title 40 of the CFR. *See* 40 CFR 22.1. This action also affects parties involved in appeal of EPA permits under part 124 of title 40 of the CFR.

III. Summary of Rule

A. Background: The EPA's Consolidated Rules of Practice in Part 22 and The EPA's Rules for Procedures for Decisionmaking on Permits in Part 124

Part 22 of Title 40 of the CFR establishes procedures governing administrative adjudicatory proceedings to assess administrative civil penalties, to issue various compliance orders, and to terminate or suspend certain permits. 40 CFR 22.1. These proceedings are conducted under a variety of environmental statutes, including the Clean Air Act, the Clean

Water Act, the Solid Waste Disposal Act, and the Federal Insecticide, Fungicide, and Rodenticide Act, among others. Such cases are generally heard by the Administrative Law Judges (ALJs) within the EPA's Office of Administrative Law Judges or Regional Judicial Officers. The part 22 regulations are titled the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/Termination or Suspension of Permits" ("Rules of Practice").

The EPA promulgated the Rules of Practice to establish uniform procedural rules for administrative proceedings required to be held on the record after opportunity for a hearing in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 551 et seq., *see* 40 CFR part 22, subparts A-G, and administrative enforcement proceedings not governed by section 554, *id.* part 22, subpart I. Consolidated Rules of Practice, 45 FR 24360 (Apr. 9, 1980). The Rules of Practice also establish supplementary rules that recognize the unique procedural requirements of certain environmental statutes within the EPA's jurisdiction. *See* 40 CFR part 22, subpart H. Finally, the Rules of Practice establish procedures for appeals from decisions of the ALJs and Regional Judicial Officers to the Environmental Appeals Board. *See id.* part 22, subpart F.

Part 124 of Title 40 of the CFR establishes rules governing the EPA's issuance, modification, and revocation of permits under the Resource Conservation and Recovery Act, the Underground Injection Control program of the Safe Drinking Water Act, the Prevention of Significant Deterioration program of the Clean Air Act, and the National Pollutant Discharge Elimination System program of the Clean Water Act. These permit rules include procedures for appealing permit decisions by the EPA's regional offices to the Environmental Appeals Board. *See* 40 CFR 124.19.

B. Amendments to Part 22 Procedures

This action makes several minor changes to part 22 procedures. Many of these changes pertain to the electronic filing and service of documents.

Filing and service. The EPA has amended the filing and service requirements to clarify how these requirements apply to electronic transmission of documents and to otherwise clarify filing and service requirements and make them more consistent with similar requirements in part 124.

Section 22.5(a) currently allows a Presiding Officer or the Environmental Appeals Board to “authorize” filing of documents by “facsimile or electronic filing.” 40 CFR 22.5(a). The EPA is amending this section to also allow a Presiding Officer or the Environmental Appeals Board to “require” filing by “facsimile or an electronic filing system.” Both the Office of the Administrative Law Judges and the Environmental Appeals Board have an operational electronic filing system. This section is also being amended to standardize the Environmental Appeals Board filing methods under part 22 with those currently in the EPA’s permit regulations in part 124.

Section 22.5(b)(2) is modified to allow parties to agree with other parties to service by facsimile or other electronic means, including but not necessarily limited to email. A party’s consent to such methods of service must be in writing and the party must file acknowledgement of such consent with the Clerk for the Presiding Officer or the Environmental Appeals Board, whichever is appropriate. This section is also modified to allow the Presiding Officer or the Environmental Appeals Board to authorize or require that the parties serve each other by facsimile or other electronic means, including but not necessarily limited to email. To facilitate electronic service, §22.5(b)(4) is modified to require that a party include an email address in the

first document it files in a proceeding.

The EPA emphasizes that the rules on electronic delivery of documents differ depending on whether the document is being *filed* with an EPA adjudicatory tribunal or *served* on a party to the proceeding. In the case of filing a document in an EPA administrative proceeding, the Presiding Officer or the Environmental Appeals Board has the sole authority to authorize or require electronic filing, and only these entities may authorize or require electronic filing by facsimile or an electronic filing system. As to service of documents between parties, not only may the Presiding Officer or the Environmental Appeals Board authorize or require service by either facsimile or other electronic means, including but not necessarily limited to email, but the parties may agree to such forms of electronic service.

Additionally, the EPA is revising §22.5(b) to clarify that in cases before the Environmental Appeals Board, documents a party files with the Board need not also be served on the Board.

Section 22.6 is amended to allow the Regional Hearing Clerk, the Headquarters Hearing Clerk, or the Clerk of the Environmental Appeals Board to serve rulings, orders, decisions, or other documents by electronic means (including but not necessarily limited to facsimile and email).

Section 22.7(c) addresses when service is considered complete and includes a provision allowing an additional period of time for response to documents served using certain procedures. *Id.* §22.7(c). The EPA has amended this section to specify that when documents are served by facsimile or other electronic means, the service will be complete upon transmission. This approach is similar to that in Rule 5(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 5(b).

The EPA has also modified the so-called “mailbox rule” in §22.7(c) providing for additional days to respond to documents served using certain procedures. As modified, the revised mailbox rule in §22.7(c) allows an additional three days to the time allowed for response to documents served by U.S. mail, the EPA’s internal mail,¹ or commercial delivery service. Three additional days are not allowed for a response when a document to be responded to is served by personal delivery or electronic means (e.g., facsimile or email). This change allows additional days where needed, but recognizes that extra days for delivery are not needed where same-day delivery is utilized. Further, this change makes part 22 consistent with the Federal Rules of Civil Procedure, including changes made to the Rules effective December 1, 2016. Rule 6(d) of the Federal Rules of Civil Procedure currently grants an additional three days when service is effectuated by U.S. mail, an agreed-to delivery service, or an electronic means. However, an amendment to Rule 6(d) that was effective December 1, 2016, removes electronic service from the types of service to which the additional three-day rule applies. Order (S. Ct. Apr. 28, 2016). This change was based on the conclusion that electronic service has become sufficiently reliable method of providing instantaneous delivery. Fed. R. Civ. P. 6(d) advisory committee’s note to 2016 amendment.

Presiding officer prior to respondent filing answer. Generally, the Presiding Officer in part 22 proceedings is an Administrative Law Judge except for proceedings under subpart I, which are not governed by section 554 of the Administrative Procedure Act. *See* 40 CFR 22.3 (definition of “Presiding Officer”) & subpart I. Regional Judicial Officers are the Presiding Officer under subpart I proceedings. *Id.* §22.51. The Environmental Appeals Board hears appeals from interlocutory orders and initial decisions of a Presiding Officer. *Id.* §22.29-22.30.

¹ EPA has specifically included “EPA internal mail” in this revision to the mailbox rule because the Environmental Appeals Board previously ruled that a prior version of this provision referencing “certified mail” did not cover a document served by EPA internal mail. *In re Outboard Marine Corp.*, 6 E.A.D. 194, 197 (EAB 1995).

However, sections 22.4(a) and 22.16(c) currently specify, among other things, that the Environmental Appeals Board will act as Presiding Officer in proceedings under part 22 commenced at EPA Headquarters until the respondent files an answer. *Id.* §§22.4(a), 22.16(c). In such proceedings, an Administrative Law Judge replaces the Environmental Appeals Board as the Presiding Officer once an answer is filed. *Id.* §22.16(c).

This rule amendment modifies §22.4(a) and §22.16(c) to authorize an Administrative Law Judge to serve as the Presiding Officer in part 22 proceedings commenced at EPA Headquarters from the time a complaint is filed. The Environmental Appeals Board will no longer be assigned as a Presiding Officer for the period between the filing of a complaint and the filing of an answer. Rather, an Administrative Law Judge will serve as the Presiding Officer both prior to and after the filing of the answer. Removing the Environmental Appeals Board from the initial stage of enforcement proceedings will enhance the efficiency of proceedings commenced at EPA Headquarters because a single entity will exercise the role of Presiding Officer. This also eliminates the possibility that the Environmental Appeals Board could be asked to review on appeal its own decision on a preliminary motion (filed before an answer is filed).

Other changes. Section 22.28 addresses motions to reopen a hearing. This rule modifies §22.28 to clarify the effect of filing such a motion and to expand the section to apply to motions to set aside a default order. The revised language clarifies that the filing of a motion to reopen a hearing tolls not only the time by when an initial decision becomes final or by when an appeal of an initial decision to the Environmental Appeals Board must be filed but also the time by which the Board must decide whether it is going to exercise its authority to hear the case on its own initiative. The revised language also applies similar requirements to a motion to set aside a

default order.

Additionally, the EPA is making a series of changes to §22.30 to clarify various issues relating to appeals to the Environmental Appeals Board. *See id.* §22.30. Section 22.30 is modified to (1) explain how attachments to a notice of appeal, appellate brief, or response brief should be identified (§22.30 (a)(1)(iii) and (2)); (2) impose word/page limitations for briefs and motions (§22.30(a)(3)); (3) provide more consistency between §22.30(a)(1)(iii) and §124.19(a)(4)(ii) pertaining to the need for parties' briefs to contain specific citations or other appropriate references (e.g., by including the document name and page number) (§22.30 (a)(1)(iii) and (2)); (4) clarify that when the Board initiates review of an initial decision, it will identify any issues to be briefed and a schedule for briefing in its initial order of its intent to review or in a subsequent order (§22.30(b)); (5) clarify that the Board may request oral argument on its own initiative, how a party must request oral argument, and that the Board may establish additional oral argument procedures by order (§22.30(d)); (6) make explicit that the Board may act on a motion without awaiting a response (§22.30(e)(2)); and (7) explain the procedure for parties to request an extension of time (§22.30(e)(3)).

C. Amendments to Part 124 Procedures

Most of the revisions to part 124 also concern filing and service issues. Section 124.19(i) addresses filing and service requirements in permit appeal proceedings before the Environmental Appeals Board. This section has been modified to add language clarifying when service is complete. Specifically, service is complete upon mailing for U.S. mail and EPA internal mail, when placed in the custody of a reliable commercial deliver service, or upon transmission for facsimile or email. This new language is similar to that in Rule 5(b)(2) of the Federal Rules of Civil Procedure and Environmental Appeals Board decisions. Fed. R. Civ. P. 5(b)(2); *see In re*

Beckman Prod. Servs., 5 E.A.D. 10, 15 (EAB 1994) (“When the Region serves a final permit decision by mail, service occurs upon mailing.”). The EPA has revised the language in §124.19(i)(3) to clarify that parties may agree to electronic service by facsimile, email, or other electronic means. The EPA has also revised §124.19(i)(3) to require that parties that consent to service by electronic means file acknowledgement of that consent with the Environmental Appeals Board.

The EPA has also made several changes to part 124 on service and filing that duplicate the changes made to part 22: (1) requiring that a party’s first filing contain an email address (§124.19(i)(3)(i)); (2) authorizing the Environmental Appeals Board to require that parties file documents by facsimile or through use of the Board’s electronic filing system (§124.19(i)(2)); (3) allowing the Environmental Appeals Board to authorize or require that the parties serve each other by facsimile or other electronic means, including email (§124.19(i)(3)(ii)); and (4) authorizing the Board to serve rulings, orders, and decisions on the parties by electronic means (including but not necessarily limited to facsimile and email). (§124.19(i)(3)(iii)).

Section 124.19(b)(1) and (2) are modified so that the deadlines for filing a response to a petition for review are based on the date the petition is served, rather than filed. This provides for appropriate notice of the petition for review in advance of the deadline for a response.

Similar to the changes made in the mailbox rule in §22.7(c), discussed above, the EPA has modified §124.20(d) to specify that three days are added to a prescribed period of time to act when service is made by U.S. mail, the EPA’s internal mail, or a reliable, commercial delivery service. Three days are not added to the prescribed time to act when service is made by personal delivery or electronic transmission (e.g., facsimile or email).

The EPA has also added word/page limitations to §124.19(f) for motions mirroring the

word/page limitations added to §22.30. Finally, the EPA has amended §124.19 (a)(4)(ii) and (b) to further clarify that parties are to provide in their briefs appropriate reference to the administrative record (e.g., by including the document name and page number) as to each issue raised.

IV. Statutory and Executive Order Reviews

A. Executive Orders 12866: Regulatory Planning and Review and 13563: Improving Regulation and Regulatory Review

This action is exempt from review by the Office of Management and Budget (OMB) because it is limited to agency organization, management, or personnel matters.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the PRA. This action will modify the EPA's procedural regulations governing administrative adjudicatory proceedings and appeals of adjudicatory proceedings and permit decisions to allow flexibility in the methods of serving and issuing documents and to promote efficiency in allocation of judicial resources. Specifically, the modifications to the Rules of Practice will codify the electronic service of documents between parties and by EPA adjudicative bodies. In addition, the modifications will facilitate the efficient issuance of rulings on motions by substituting an Administrative Law Judge for the Environmental Appeals Board to serve as the presiding officer in civil penalty cases initiated at EPA Headquarters before an answer is filed.

C. Regulatory Flexibility Act

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. This rule pertains to agency management or personnel, which the APA

expressly exempts from notice and comment rulemaking requirements under 5 U.S.C. 553(a)(2).

D. Unfunded Mandates Reform Act

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175 Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175. This action will modify the EPA’s procedural regulations governing administrative adjudicatory proceedings and appeals of adjudicatory proceedings and permit decisions to allow flexibility in the methods of serving and issuing documents and to promote efficiency in allocation of judicial resources. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant

regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

This action will modify the EPA's procedural regulations governing administrative adjudicatory proceedings and appeals of adjudicatory proceedings and permit decisions to allow flexibility in the methods of serving and issuing documents and to promote efficiency in allocation of judicial resources.

K. Congressional Review Act

This rule is exempt from the CRA because it is a rule relating to agency management or personnel.

List of Subjects*40 CFR Part 22*

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedures.

Dated: December 20, 2016.

Gina McCarthy,
Administrator.

For the reasons set out in the preamble, 40 CFR parts 22 and 124 are amended as follows:

**PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE
ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE
REVOCATION/TERMINATION OR SUSPENSION OF PERMITS**

1. The authority citation for part 22 is revised to read as follows:

Authority: 7 U.S.C. 136l; 15 U.S.C. 2615; 33 U.S.C. 1319, 1342, 1361, 1415 and 1418; 42 U.S.C. 300g–3(g), 6912, 6925, 6928, 6991e and 6992d; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547, 7601 and 7607(a), 9609, and 11045.

Subpart A—General

2. In §22.4, revise the first sentence of paragraph (a)(1) to read as follows:

§22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

(a) *Environmental Appeals Board.* (1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice, and approves settlement of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters. * * *

* * * * *

3. In §22.5, revise the section heading and paragraphs (a)(1), (b) introductory text, (b)(2), and (c)(4) to read as follows:

§22.5 Filing, service by the parties, and form of all filed documents; business confidentiality claims.

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Headquarters or Regional Hearing Clerk, as appropriate, when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when

the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. When a document is required to be filed with the Environmental Appeals Board, the document shall be sent to the Clerk of the Board by U.S. Mail, delivered by hand or courier (including delivery by U.S. Express Mail or by a commercial delivery service), or transmitted by the Environmental Appeal Board's electronic filing system, according to the procedures specified in 40 CFR 124.19 (i)(2)(i), (ii), and (iii). The Presiding Officer or the Environmental Appeals Board may by order authorize or require filing by facsimile or an electronic filing system, subject to any appropriate conditions and limitations.

* * * * *

(b) *Service of documents.* Unless the proceeding is before the Environmental Appeals Board, a copy of each document filed in the proceeding shall be served on the Presiding Officer and on each party. In a proceeding before the Environmental Appeals Board, a copy of each document filed in the proceeding shall be served on each party.

* * * * *

(2) *Service of filed documents other than the complaint, rulings, orders, and decisions.* All documents filed by a party other than the complaint, rulings, orders, and decisions shall be served by the filing party on all other parties. Service may be made personally, by U.S. mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), by any reliable commercial delivery service, or by facsimile or other electronic means, including but not necessarily limited to email, if service by such electronic means is consented to in writing. A party who consents to service by facsimile or email must file an acknowledgement of its consent (identifying the type of electronic means agreed to and the electronic address to be used) with the appropriate Clerk. In addition, the Presiding Officer or the Environmental Appeals Board may

by order authorize or require service by facsimile, email, or other electronic means, subject to any appropriate conditions and limitations.

(c) * * *

(4) The first document filed by any person shall contain the name, mailing address, telephone number, and email address of an individual authorized to receive service relating to the proceeding on behalf of the person. Parties shall promptly file any changes in this information with the Headquarters or Regional Hearing Clerk or the Clerk of the Board, as appropriate, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and §22.6.

* * * * *

4. Revise §22.6 to read as follows:

§22.6 Filing and service of rulings, orders and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer shall be filed with the Headquarters or Regional Hearing Clerk, as appropriate, in any manner allowed for the service of such documents. All rulings, orders, decisions, and other documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. The Clerk of the Board, the Headquarters Hearing Clerk, or the Regional Hearing Clerk, as appropriate, must serve copies of such rulings, orders, decisions and other documents on all parties. Service may be made by U.S. mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), EPA's internal mail, any reliable commercial delivery service, or electronic means (including but not necessarily limited to facsimile and email).

5. In §22.7, revise paragraph (c) to read as follows:

§22.7 Computation and extension of time.

* * * * *

(c) *Completion of service.* Service of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing, when placed in the custody of a reliable commercial delivery service, or for facsimile or other electronic means, including but not necessarily limited to email, upon transmission. Where a document is served by U.S. mail, EPA internal mail, or commercial delivery service, including overnight or same-day delivery, 3 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document. The time allowed for the serving of a responsive document is not expanded by 3 days when the served document is served by personal delivery, facsimile, or other electronic means, including but not necessarily limited to email.

Subpart C—Prehearing Procedures

6. In §22.16, revise paragraph (c) to read as follows:

§22.16 Motions.

* * * * *

(c) *Decision.* The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, an Administrative Law Judge) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision becomes final or has been appealed. The Environmental Appeals Board shall rule as provided in §22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, except as provided pursuant to §22.28.

7. Revise the subpart E heading to read as follows:

Subpart E--Initial Decision, Motion to Reopen a Hearing, and Motion to Set Aside a Default Order

8. Revise §22.28 to read as follows:

§22.28 Motion to reopen a hearing or to set aside a default order.

(a) *Motion to reopen a hearing—(1) Filing and content.* A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: state briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Headquarters or Regional Hearing Clerk, as appropriate. A copy of the motion shall be filed with the Clerk of the Board in the manner prescribed by §22.5(a)(1).

(2) *Disposition of motion to reopen a hearing.* Within 15 days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Headquarters or Regional Hearing Clerk, as appropriate, and serve on all other parties a response. A reopened hearing shall be governed by the applicable sections of these Consolidated Rules of Practice. The timely filing of a motion to reopen a hearing shall automatically toll the running of the time periods for an initial decision becoming final under §22.27(c), for appeal under §22.30, and for the Environmental Appeals Board to elect to review the initial decision on its own initiative pursuant to §22.30(b). These time periods begin again in full when the Presiding Officer serves an order denying the motion to reopen the hearing or an amended decision. The Presiding Officer may summarily deny subsequent motions to reopen a hearing filed by the same party if the Presiding Officer determines that the motion was filed to delay the finality of the decision.

(b) *Motion to set aside default order—(1) Filing and content.* A motion to set aside a

default order must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. The motion shall be made to the Presiding Officer and filed with the Headquarters or Regional Hearing Clerk, as appropriate. A copy of the motion shall be filed with the Clerk of the Board in the manner prescribed by §22.5(a)(1).

(2) *Effect of motion to set aside default.* The timely filing of a motion to set aside a default order automatically tolls the running of the time periods for an initial decision becoming final under §22.27(c), for appeal under §22.30(a), and for the Environmental Appeals Board to elect to review the initial decision on its own initiative pursuant to §22.30(b). These time periods begin again in full when the Presiding Officer serves an order denying the motion to set aside or an amended decision. The Presiding Officer may summarily deny subsequent motions to set aside a default order filed by the same party if the Presiding Officer determines that the motion was filed to delay the finality of the decision.

Subpart F—Appeals and Administrative Review

9. In §22.30, revise paragraphs (a), (b), (c), (d), and (e) to read as follows:

§22.30 Appeal from or review of initial decision.

(a) *Notice of appeal and appeal brief*—(1) *Filing an appeal*— (i) *Filing deadline and who may appeal.* Within 30 days after the initial decision is served, any party may file an appeal from any adverse order or ruling of the Presiding Officer.

(ii) *Filing requirements.* Appellant must file a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board as set forth in §22.5(a). One copy of any document filed with the Clerk of the Board shall also be served on the Headquarters or Regional Hearing Clerk, as appropriate. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all

other parties and non-party participants.

(iii) *Content.* The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with appropriate page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with specific citation or other appropriate reference to the record (e.g., by including the document name and page number)), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If any appellant includes attachments to its notice of appeal or appellate brief, the notice of appeal or appellate brief shall contain a table that provides the title of each appended document and assigns a label identifying where it may be found in the record.

(iv) *Multiple appeals.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal and accompanying appellate brief on any issue within 20 days after the date on which the first notice of appeal was served or within the time to appeal in paragraph (a)(1)(i) of this section, whichever period ends later.

(2) *Response brief.* Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may file with the Environmental Appeals Board an original and one copy of a response brief responding to arguments raised by the appellant, together with specific citation or other appropriate reference to the record, initial decision, and opposing brief (e.g., by including the document name and page number). Appellee shall simultaneously serve one copy of the response brief upon each party, non-party participant, and the Regional Hearing Clerk. Response briefs shall be limited to the scope of the appeal brief. If any responding party or non-party participant includes attachments

to its response brief, the response brief shall contain a table that provides the title of each appended document and assigns a label identifying where it may be found in the record. Further briefs may be filed only with leave of the Environmental Appeals Board.

(3) *Length*—(i) *Briefs*. Unless otherwise ordered by the Environmental Appeals Board, appellate and response briefs may not exceed 14,000 words, and all other briefs may not exceed 7000 words. Filers may rely on the word-processing system used to determine the word count. As an alternative to this word limitation, filers may comply with a 30-page limit for appellate and response briefs, or a 15-page limit for replies. Headings, footnotes, and quotations count toward the word limitation. The table of contents, table of authorities, table of attachments (if any), statement requesting oral argument (if any), statement of compliance with the word limitation, and any attachments do not count toward the word or page-length limitation. The Environmental Appeals Board may exclude any appeal, response, or other brief that does not meet word or page-length limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Environmental Appeals Board to file a longer brief. Such requests are discouraged and will be granted only in unusual circumstances.

(ii) *Motions*. Unless otherwise ordered by the Environmental Appeals Board, motions and any responses or replies may not exceed 7000 words. Filers may rely on the word-processing system used to determine the word count. As an alternative to this word limitation, filers may comply with a 15-page limit. Headings, footnotes, and quotations count toward the word or page-length limitation. The Environmental Appeals Board may exclude any motion that does not meet word limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Environmental Appeals

Board. Such requests are discouraged and will be granted only in unusual circumstances.

(b) *Review initiated by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall issue an order notifying the parties and the Presiding Officer of its intent to review that decision. The Clerk of the Board shall serve the order upon the Regional Hearing Clerk, the Presiding Officer, and the parties within 45 days after the initial decision was served upon the parties. In that order or in a later order, the Environmental Appeals Board shall identify any issues to be briefed by the parties and establish a time schedule for filing and service of briefs.

(c) *Scope of appeal or review.* The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction. If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties written notice of such determination to allow preparation of adequate argument. The Environmental Appeals Board may remand the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, at its discretion in response to a request or on its own initiative, order oral argument on any or all issues in a proceeding. To request oral argument, a party must include in its substantive brief a statement explaining why oral argument is necessary. The Environmental Appeals Board may, by order, establish additional procedures governing any oral argument before the Environmental Appeals Board.

(e) *Motions on appeal—(1) General.* All motions made during the course of an appeal shall conform to §22.16 unless otherwise provided. In advance of filing a motion, parties must attempt to ascertain whether the other party(ies) concur(s) or object(s) to the motion and must

indicate in the motion the attempt made and the response obtained.

(2) *Disposition of a motion for a procedural order.* The Environmental Appeals Board may act on a motion for a procedural order at any time without awaiting a response.

(3) *Timing on motions for extension of time.* Parties must file motions for extensions of time sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Environmental Appeals Board with a reasonable opportunity to issue an order.

* * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

10. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

Subpart A—General Program Requirements

11. In §124.19:

- a. Revise the first sentence of paragraph (a)(4)(ii), and paragraph (b).
- b. Redesignate paragraph (f)(5) as paragraph (f)(6).
- c. Add a new paragraph (f)(5).
- d. Revise paragraphs (i) introductory text, (i)(2) introductory text, and (3).

The addition and revisions read as follows:

§124.19 Appeal of RCRA, UIC, NPDES and PSD Permits.

(a) * * *

(4) * * *

(ii) Petitioners must demonstrate, by providing specific citation or other appropriate reference to the administrative record (e.g., by including the document name and page number), that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required by §124.13. * * *

(b) *Response(s) to a petition for review.* (1) In a PSD or other new source permit appeal, the Regional Administrator must file a response to the petition for review, a certified index of the administrative record, and the relevant portions of the administrative record within 21 days after the service of the petition. The response brief must respond to arguments raised by the appellant, together with specific citation or other appropriate reference to the record (e.g., by including the document name and page number).

(2) In all other permit appeals under this section, the Regional Administrator must file a response to the petition, a certified index of the administrative record, and the relevant portions of the administrative record within 30 days after the service of a petition.

* * * * *

(f) * * *

(5) *Length.* Unless otherwise ordered by the Environmental Appeals Board, motions and any responses or replies may not exceed 7000 words. Filers may rely on the word-processing system used to determine the word count. In lieu of a word limitation, filers may comply with a 15-page limit. Headings, footnotes, and quotations count toward the word or page-length limitation. The Environmental Appeals Board may exclude any motion that does not meet word limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Environmental Appeals Board. Such

requests are discouraged and will be granted only in unusual circumstances.

* * * * *

(i) *Filing and service requirements.* Documents filed under this section, including the petition for review, must be filed with the Clerk of the Environmental Appeals Board. A document is filed when it is received by the Clerk of the Environmental Appeals Board at the address specified for the appropriate method of delivery as provided in paragraph (i)(2) of this section. Service of a document between parties to an appeal or by the Environmental Appeals Board on a party is complete upon mailing for U.S. mail or EPA internal mail, when placed in the custody of a reliable commercial delivery service, or upon transmission for facsimile or email.

* * * * *

(2) *Method of filing.* Unless otherwise permitted under these rules, documents must be filed either by using the Environmental Appeals Board's electronic filing system, by U.S. mail, or by hand delivery. In addition, a motion or a response to a motion may be submitted by facsimile if the submission contains no attachments. Upon filing a motion or response to a motion by facsimile, the sender must, within one business day, submit the original copy to the Clerk of the Environmental Appeals Board either electronically, by mail, or by hand-delivery. The Environmental Appeals Board may by order require filing by facsimile or the Board's electronic filing system, subject to any appropriate conditions and limitations.

* * * * *

(3) *Service—(i) Service information.* The first document filed by any person shall contain the name, mailing address, telephone number, and email address of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Clerk of the Environmental Appeals Board, and serve copies on all

parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (i)(3) of this section.

(ii) *Service requirements for parties.* Petitioner must serve the petition for review on the Regional Administrator and the permit applicant (if the applicant is not the petitioner). Once an appeal is docketed, every document filed with the Environmental Appeals Board must be served on all other parties. Service must be by first class U.S. mail, by any reliable commercial delivery service, or, if agreed to by the parties, by facsimile or other electronic means, including but not necessarily limited to or email. A party who consents to service by facsimile or other electronic means must file an acknowledgement of its consent (identifying the type of electronic means agreed to and the electronic address to be used) with the Clerk of the Environmental Appeals Board. The Environmental Appeals Board may by order authorize or require service by facsimile, email, or other electronic means, subject to any appropriate conditions and limitations.

(iii) *Service of rulings, orders, and decisions.* The Clerk of the Environmental Appeals Board must serve copies of rulings, orders, and decisions on all parties. Service may be made by U.S. mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), EPA's internal mail, any reliable commercial delivery service, or electronic means (including but not necessarily limited to facsimile and email).

* * * * *

12. In §124.20, revise paragraph (d) to read as follows:

§124.20 Computation of time.

* * * * *

(d) When a party or interested person may or must act within a prescribed period after

being served and service is made by U.S. mail, EPA's internal mail, or reliable commercial delivery service, 3 days shall be added to the prescribed time. The prescribed period for acting after being served is not expanded by 3 days when service is made by personal delivery, facsimile, or email.

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